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February 17, 1984

Mr. Charles W. Desmarais, Jr.
Financial Responsibility Administrator
Division of Motor Vehicles
hazen Drive
Concord, New Hampshire 03301

Dear Mr. Desmarais:

By memorandum dated December 15, 1983, you requested our opinion concerning the revocation penalty to be imposed in the situation where an individual who has refused to take a test to determine blood alcohol content has a prior DWI conviction that is under appeal at the time of the subsequent refusal. In our opinion, a one-year license revocation must be imposed if there is a prior conviction, even if that conviction is being appealed.

RSA 265:92, I provides that a person under arrest for a violation or misdemeanor under RSA 265 who refuses to submit to a test to determine blood alcohol content must lose his license for 90 days if it is the first refusal with no prior DWI or aggravated DWI convictions. Subparagraph (b) provides, however:

"If the person has a prior driving while intoxicated or aggravated driving while intoxicated conviction or more than one refusal of consent under this section ... [t]he director shall revoke his license to drive or nonresident driving privilege for a period of one year ..."

The answer to the question you have raised depends to a large degree upon whether a DWI or aggravated DWI conviction in the



district court which is on appeal to the superior court constitutes a conviction within the meaning of RSA 265:92, I(b).

The New Hampshire Supreme Court has held that the effect of an appeal to the superior court is to vacate the judgment of the district court. State v. Hennessey, 110 N.H. 447 (1970); State v. Cook, 96 N.H. 212 (1950). The Supreme Court has also held, however, that the suspension or revocation of a person's driver's license before his conviction by a jury, in other words, before the case has been heard on appeal to the Supreme Court, is not unconstitutional, State v. Dickson, 116 N.H. 175 (1976); State v. Handfield, 115 N.H. 628 (1975), and that the revocation is not a criminal punishment. State v. Bowles, 113 N.H. 571 (1973).

RSA 265:92 is mandatory in that it requires the Director of Motor Vehicles to revoke for one year the driver's license of a person who has a prior DWI or aggravated DWI conviction or a prior refusal. No discretion is allowed. Moreover, the revocation is civil, not criminal, in nature. The action is taken independently of any criminal punishment.

If the legislature had intended to stay the revocation of a license pending the results of an appeal of a prior conviction, it could have so stated. See, Campbell v. Superior Court, County of Maricopa, 462 P.2d 801 (Ariz. 1969). In the absence of any language to the contrary, however, we must conclude that the legislature intended to have the revocation become effective once the conviction was obtained. See, Parker v. State Highway Department, 78 S.E.2d 382 (S.C. 1953).

Although there is some conflict in the jurisdictions around the country as to the meaning of the term "convicted,"¹ in light of the mandatory language of the statute and the absence of a stay provision we see no reason for the Director of Motor Vehicles to stay the revocation pending the results of the appeal of the prior conviction. The intent of the law is

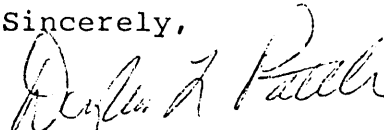
¹See State v. DeBery, 103 A.2d 528 (Me. 1954), where the court said that the defendant is not deemed convicted until he has reached the stage where no issue of law or fact determinative of guilt remains to be decided. But see, Parker v. State Highway Department, *supra*, and Cozens v. Superior Court, County of Orange, 107 Cal.Rptr. 408 (Ct. App. 1973), where the courts have held that the fact that a defendant has chosen to appeal does not alter his status as a person convicted of DWI for the purposes of a revocation.

clearly to impose a greater penalty on a person who has a prior DWI or aggravated DWI conviction or a prior refusal. A conviction in district or municipal court clearly qualifies as such a conviction.

It should also be noted, however, that if the prior conviction is reversed on appeal, the person's license must be restored after the 90-day revocation has expired or as soon as notification of the reversal is received if the 90 days have already expired.

I trust this has been responsive to your question. Please let me know if you require anything further.

Sincerely,



Douglas L. Patch
Assistant Attorney General
Division of Legal Counsel

DLP:ab
#83-168-I

cc: Mr. Richard M. Flynn, Commissioner
Mr. Earl M. Sweeney, Deputy Commissioner
Mr. Thomas A. Power, Director